United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1061

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1061

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—*against*—

RICHARD KESTENBAUM,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLANT RICHARD KESTENBAUM

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TABLE OF CONTENTS

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Preliminary Statement

This is an appeal from a judgment of conviction entered on January 9th, 1976, by the United States District Court for the Southern District of New York (Duffy, *D.J.*) confining Richard Kestenbaum under the Youth Correction Act for a period not to exceed two years. Kestenbaum is confined and serving said sentence.

On appeal Kestenbaum contends that the District Court failed to apply constitutional standards prior to and after admission to violation of probation. Also the time spent on probation should be credited to Kestenbaum's two years jail sentence.

Summary

Richard Kestenbaum by his admission of guilt on March 12th, 1973 (Duffy, *D.J.*) committed two crimes against the United States Government: (1) Forging of a treasury check and (2) Uttering or passing of said check. Kestenbaum waived indictment and pleaded guilty as set forth in an information prepared by the United States Attorney's Office.

On May 15th, 1973, Kestenbaum was placed on two years probation. On February 21st, 1975, Kestenbaum admitted to a violation of specification No. 3 of his terms of probation in that he failed to pay the sum of $146.00 restitution. For this particular violation Kestenbaum's probation was extended for one year to expire on May 14th, 1976.

Through a memorandum by the probation department dated September 11th, 1975, Kestenbaum was on October 14th, 1975, again charged with violation of probation in that he failed to keep steady employment. When confronted with this new charge Kestenbaum said "I do". The Court accepted "I do" as an admission that Kestenbaum failed to maintain steady employment. Probation was revoked and Kestenbaum was ordered by the Court to be placed in a study section under 5010 (E) for a period of 60 days or as long theerafter as may be required to complete such study. On January 9th, 1976, the Court committed Kestenbaum under the Youth Correction Act for a period not to exceed two years.

POINT I

The court below clearly abused its discretion and sentencing power by imposition of two years imprisonment for not being gainfully employed. The punishment imposed upon this youthful offender for a violation after almost three years on probation is harsh, cruel and unusual and does not comport with the standards as specified in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972) and *Wolff* v. *McDonnell*, 418 U.S. 569 (1974).

Richard Kestenbaum by his admission of guilt on March 12th, 1973 (Duffy, *D.J.*) committed two crimes against the United States Government. The crimes are (1) Forging of a treasury check and (2) Uttering or passing of that check. Kestenbaum waived indictment and pleaded guilty to the crimes as set forth in an information prepared by the United States Attorney's Office. Transcript of March 12th, 1973 at pp. 3-5.

The Court on May 15th, 1973, placed Kestenbaum on two years probation. On February 21st, 1975, for failure to pay $146.00 restitution the Court extended the probation for one year to terminate on May 14th, 1976.

In Gagnon v. *Scarpelli*, 411 U.S. 778 (1972) it was held by the Court that due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in the case of a parolee as outlined in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).

Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. It seems quite clear at least after *Morrissey*

v. *Brewer*, *supra*, that a probationer can no longer be denied due process, in reliance upon the dictum in *Escoe* v. *Zerbst*, 295 U.S. 490, 492 (1935), that probation is an "act of grace".

In *Morrissey* it was recognized that the revocation decision has two analytically distinct components. *Morrissey* mandated a preliminary and final revocation hearings.

At the preliminary hearing a probationer is entitled to notice of the alleged violations of probation, *an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses*, an independent decision maker, and a written report of the hearing. *Morrissey* at p. 487 (emphasis ours).

The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements.

> "(A) Written Notice of the claimed violation of [probation or] Parole; (B) disclosure to the [probationer or] parolee of evidence against him; (C) opportunity to be heard in person and to present witnesses and documentary evidence; (D) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation; (E) a 'neutral and detached' hearing body such as a traditional parole board, members of which need be judicial officers or lawyers; and (F) a written statement by the fact-finders as to the evidence relied on and reasons for revoking [probation or] parole." *Gagnon* v. *Scarpelli*, 13 CRL 3081 at pp. 3083-3084.

When *Morrissey* and *Scarpelli* are read together with *Wolff* v. *McDonnell*, 418 U.S. 569 (1974) they clearly spell out that the Court below failed to advise Kestenbaum of his rights prior to or at the time of accepting Kestenbaum's "I do" as an admission to specification number 2.

The minutes of October 14th, 1975, at p. 2 of the hearing reflect the following:

> "The Clerk: The Probation Office charges you with the following specification, that you have failed to maintain steady employment, specification number 2. How do you plead, Guilty or not Guilty?
>
> The Court: No. Do you admit or deny?
>
> The Clerk: Do you admit or deny specification?
>
> Defendant: I do."

It is worthy to note that on February 21st, 1975, at a prior Probation Violation hearing the court prior to accepting Kestenbaum's admission the following was said at pp. 3-5:

> "The Court interrogated the defendant as follows:
>
> Q. Mr. Kestenbaum, do you realize that if you did not admit specification No. 3 that the probation would have to prove the specification against you? A. Yes.
>
> Q. Do you know that the Government would have to call witnesses and your counsel would be entitled to cross-examine those witnesses? A. (nodding head).
>
> The Court: The record should reflect the probationer had nodded yes to both of those questions.

Q. Basically, the charge against you in this violation of probation is that you did not repay a sum of money which was to be in restitution. Do you understand that? A. Yes.

Q. Do you understand that by admitting this particular violation of probation it is possible for this Court to put you in jail or continue you on probation? A. Yes, sir.

The Court: What would the maximum be?

Mr. Rosenthal: Ten years and or a thousand dollars fine.

Q. Did you hear that? A. Yes, sir.

Q. And you are still willing to admit the violation, is that right? A. Yes.

Q. Did anybody make any threats or promises to you? A. No sir.

Q. Did anyone even make a suggestion as to what I might sentence you to for this violation? A. No.

The Court: Mr. Rosenberg, do you know of any reason whatsoever why I should not accept the admission of this violation of probation?

Mr. Rosenberg: No sir.

The Court: I so find that the admission is voluntary and it is appropriate for this Court to accept the admission."

The Court's failure to advise Kestenbaum created a "grievous loss". The two years imprisonment should not have been imposed in the absence of basic elements of rudimentary due process.

Since the Court failed to apply applicable standards on October 14th, 1975, as it did on February 21st, 1975,

by the law and cases cited in *Morrissey*, *Scarpelli* and *Wolff* the Judgment below should be vacated and Kestenbaum be given the right to plead anew to the alleged specification of violation.

POINT II

The restrictive probation conditions imposed by the court and failure to credit probation time into the two years imprisonment violates defendant's constitutional right not to be punished twice for the same crime. The defendant should be discharged.

On May 15th, 1973, the Court imposed the following four special provisions of probation upon the appellant Richard Kestenbaum. It was said at pp. 4-5 of the transcript:

> "It is the judgment of this Court that the defendant be placed on a probation under the youth correction act with four special provision of probation:
>
> 1. There was $146.00 involved. That money is to be restored to the United States Government.
>
> 2. The defendant is also to continue his participation in psychotherapy until such time as the doctor releases him and advises the probation department of his release.
>
> 3. He has got to get himself a job. I don't mean a job working with his mother. I want him to get a job either full-time or part-time where he would be basically expending his energies in work rather than looking for trouble.
>
> And Fourthly, as a special condition of probation, there is to be a continued abstinence from drugs."

On February 21st, 1975, after almost 22 months of probation time Kestenbaum was charged with five specifications of probation violations which were stated at p. 3 of the transcript as follows: (1) failed to report on July 16th, 1974, as instructed; (2) failed to participate in our drug abuse program as instructed by the U.S.P.O.; (3) did not make $146.00 restitution ordered by the Court as a special condition of probation; (4) failed to maintain gainful employment or continue in therapy as directed by the Court and (5) Kestenbaum left the jurisdiction and went to Florida without prior permission.

Kestenbaum admitted specification No. 3, failure to pay $146.00. By admitting this probation violation the Court continued probation and extended the probation to expire on May 14th, 1976, with the other conditions of probation to continue.

Through a memorandum by the probation department dated September 11th, 1975, Kestenbaum was on October 14th, 1975 again charged with various probation violations. Kestenbaum said "I do". The Court accepted "I do" as an admission that he failed to maintain steady employment.

The Court then ordered Kestenbaum "be placed in a study section under 5010 (E) for a period of 60 days or as long thereafter as may be required to complete such study." The Court's order was to take effect after Kestenbaum surrenders until the next Tuesday from October 14th, 1975. See pp. 9, 11 of October 14th, 1975 transcript.

On January 9th, 1976, the Court committed Kestenbaum "under the youth correction act for a period not to exceed two years." See p. 5 of the transcript.

From May 15th, 1973, until January 9th, 1976, Kestenbaum was under restrictive Court imposed probation

conditions. The Court and the Probation Department had Kestenbaum under complete and controlled discretion of his life.

Up and until now Kestenbaum has lost almost 31 months time credit on 24 months of the Court's final judgment sentence.

During the 31 months Kestenbaum was on probation, his life style was restricted to the Court's specifically imposed limitations. Kestenbaum's probation conditions placed drastic restrictions on his mobility, his drinking practices, his associates, his operation of a motor vehicle and upon his freedom to marry or re-marry, to make debts or purchases, to accept or change employment, or to change his residence.

Kestenbaum was compelled to report to the Probation Officer when and as directed. To submit to inspections at his home and at work, to waive extradition from any other state and to abide by any special conditions.

Kestenbaum was constrained to pledge himself to abandon his privilege against self-incrimination by reporting immediately to his Probation Officer any incident that might lead to an arrest while on probation.

Failure to pay $146.00 and to keep steady employment are not cognizable criminal acts. Yet these two probation violations caused Kestenbaum's incarceration for two years notwithstanding that he had spent 31 months on a restrictive period of probation.

Kestenbaum did not create the probation system nor had he the power to require his original probation, that was done by the Court's discretion. Kestenbaum's probation and its myriad conditions were part of the regular processes of the Federal Law and had nothing to do with any effort on Kestenbaum's part to withdraw his plea and seek an indictment and a jury trial.

There is no rational connection between the non criminal conduct of Kestenbaum of which the Court convicted the petitioner and the prison sentence imposed.

The above considerations demonstrate that Kestenbaum has been subjected to double and increased punishment.

Kestenbaum did not ask for the processes which led to his extended sentence.

Where punishment is increased after conviction by the trial Court but not as an option in the criminal process pursued by Kestenbaum, such increase in punishment after over 31 months of hardship conditions is unconstitutional and Kestenbaum has been seriously prejudiced thereby.

The decision in *United States* v. *Benz*, 282 U.S. 304 (1931); *Ex Parte Lange*, 85 U.S. 163 (18 Wall) (1874); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *Howie* v. *Byrd*, U.S.D.C. W.N.C., 5/14/75, 17 C.R.L. 2185 and similar cases may not be in point but they do shed light that since *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972) Parole and Probation violation stand on equal footing.

Parole and probation restrictions are also the same. The same restrictions that are considered punishment to a parolee are the same type of punishment imposed upon a probationer. See *Howie* v. *Byrd*, *supra*, at pp. 2185-2186.

Kestenbaum has been sufficiently punished and should be discharged from custody forthwith in the interest of justice.

CONCLUSION

Judgment of the court below should be reversed. Kestenbaum should be granted a new probation violation hearing and/or should be discharged from custody.

Respectfully submitted,

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